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Of Attorneys for Plaintiff Valhalla Custom Homes, LLC

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

VALHALLA CUSTOM HOMES LLC, an Oregon limited liability company,

Plaintiff,

vs.

THE CITY OF PORTLAND, an Oregon Municipal Corporation; **TED WHEELER**, individually and in his official capacity; **CHLOE EUDALY**, individually and in her official capacity; **CHRIS WARNER**, individually and in his official capacity; **KURT KRUEGER**, individually and in his official capacity; **AMANDA OWINGS**, in her official capacity; and **LEWIS WARDRIP**, in his official capacity,

Defendants.

Civil Case No. 3:21-cv-00225-JR

PLAINTIFF'S MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

ORAL ARGUMENT REQUESTED

Plaintiff moves this Court for leave to file a Surreply in opposition to Defendants Motions to Dismiss [EFC 26]. In accordance with L.R. 7-1(a)(1), counsel for Plaintiff has conferred with counsel for Defendants, William Manlove. Defendants oppose this motion. Specifically, Plaintiff requests an order allowing Plaintiff to file the attached Surreply in response to new arguments and factual claims made by Defendants in Defendants' Reply [ECF 44] to Plaintiff's Response [ECF 39] to Defendants' Rule 12 Motions to Dismiss of August 16, 2021 (Surreply attached hereto as Exhibit 1). Those arguments and claims did not appear in Defendants' previous Motions to Dismiss, and thus Plaintiff has not had an opportunity to respond. This motion is based upon the complete court file and upon the Declaration of Gregory S. Hathaway, filed herewith.

The standard for granting a leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply. *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001). As explained below, Plaintiff satisfies this standard because Defendants' Reply Brief presents several matters for the first time, and Plaintiff has not been able to contest these matters.

Defendants assert, for the first time, that *Thomas v. Wasco County*, LUBA No. 2008-206 (March 3, 2009), and *Campbell v. Multnomah County*, LUBA

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No. 93-032 (June 17, 1993), stand for the proposition that ORS 92.017 does not prevent the Director from treating the Sumner Properties as if they were not separately developable. Defendants previously argued that PCC 17.28.110.C.1 called for the consolidation of property frontages, but now claim not to be consolidating the Sumner Properties but instead deeming them not separately developable. (Reply, pp. 1-2, 6.)

Defendants also assert, for the first time, argument as to how "reasonable access" ought to be defined in this case. Defendants assert that a residential property may be deprived of all vehicular access, yet still be deemed to have "reasonable access." (Reply, p. 2.) Defendants further claim, for the first time, that any vehicular access equates to "reasonable access." (Reply, p. 3.) Defendants erroneously cite *Kiasantana LLC v. Tri-County Metropolitan District of Oregon*, 20121 WL 2903228, *4 (D. Or), as authority for this new argument.

Defendants further assert, for the first time, that a true shared driveway is not what the Director's Policy requires. (Reply, pp. 3, 15.)

Defendants assert, for the first time, that pursuant to ORS 197.015(10)(b)(D), the decision Defendant Owings rendered was neither a land use decision nor a limited land use decision and, therefore, the statutory procedural

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requirements for quasi-judicial land use or limited land use decisions were not required. (Reply, p. 10.)

Defendants assert that, "[r]emedies available in state court proceedings can satisfy the 14th Amendment's Due Process Clause" citing for the first time *Zinermon v. Burch*, 494 U.S. 113, 125-126 (1990), as authority for their argument that the availability of Postdeprivation due process was adequate in this case. (Reply, p. 3.)

Defendants newly cite *Coleman v. Oregon Parks and Recreation Dep't*, 227 P.3d 815, 234 Or App 132 (2010), as a case in which Defendants claim the notice given (no formal notice) was "akin" to the tort claim notice Plaintiff provided to Defendants on October 25, 2019. (Reply, p. 17.)

Defendants assert, for the first time, that even though the actual document in which the act of fraud occurred (the June 8, 2018 letter) was specifically cited in Plaintiff's tort claim notice with reference as to why Plaintiff deemed the document to be one of the circumstances giving rise to the claim – that the City had previously agreed that ORS 197.307(4) applied to driveways and had subsequently acted in a manner wholly inconsistent with a proceeding under ORS 197.307(4) – the City needed to also be referred to the Rodney Settlement Agreement to understand the time, place, and circumstances giving rise to the claim. Defendants

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ignore the allegations in Plaintiff's FAC and falsely claim that the basis for the fraud claim is merely a "misreading" of letters. (Reply, p. 17.)

Defendants falsely claim that "Plaintiff concedes its Fraud in the Inducement claim is not meant to be a stand-alone claim." (Reply, pp. 5,17.)

Defendants assert, for the first time, that "the City's rules regarding set-back distances" are defined as those imposed by DRP 6.03. (Reply, pp. 14-15.) However, on page 8 of their Reply, Defendants assert that DRP 6.03 is not a rule. "DRP 6.03 is an administrative regulation, directed at PBOT employees, with the sole purpose of furthering the Director and City Traffic Engineer's public safety judgments, … ." (Reply, p. 8.)

Defendants falsely claim that "Plaintiff concedes the City's distinction between attached and detached housing with respect to access to the right-of-way is rationally related to serving legitimate government interests. (See Plaintiff's Response, p.44.)" (Reply, p. 15.)

Defendants falsely claim that "Plaintiff concedes that neither Defendants Wheeler nor Eudaly could have had the invidious, discriminatory intent necessary for Plaintiff's Equal Protection Claim. (Plaintiff's Response, p. 56)." (Reply, p. 18.) The foregoing misstates both the law and Plaintiff's position.

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None of the arguments, or false claims described above, appeared in Defendants' Motion to Dismiss, and Plaintiff has not had the opportunity to respond. Plaintiff has attached a Surreply which addresses only these new arguments and false claims asserted in Defendants' Reply and raises no new arguments.

Based on the foregoing, counsel for Plaintiff respectfully requests leave to file the attached Surreply.

DATED this 17th day of September 2021.

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By s/ Gregory S. Hathaway

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PLAINTIFF'S SURREPLY IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Hathaway Larson LLP
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State Statutes

Hathaway Larson LLP
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Portland City Codes

Other Authorities

Exhibits

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PLAINTIFF'S SURREPLY IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

In Defendants' Reply in response to Plaintiff's Response to Defendants' Motions to Dismiss Plaintiff's First Amended Complaint ("FAC"), Defendants raise new arguments and false claims supported by new authorities that were not made in Defendants' initial brief. Having moved for leave to file a Surreply in the accompanying motion, Plaintiff hereby responds to these new arguments, false claims, and authorities.

Consolidation v. Not Separately Developable

Defendants assert, for the first time, that *Thomas v. Wasco County*, LUBA No. 2008-206 (March 3, 2009), and *Campbell v. Multnomah County*, LUBA No. 93-032 (June 17, 1993), stand for the proposition that ORS 92.017 does not prevent the Director from treating the Sumner Properties as if they were not separately developable. In other words, while Defendants previously argued that PCC 17.28.110.C.1 called for the consolidation of property frontages, they now claim not to be consolidating them but simply deeming them not separately developable. Thereby depriving each property of its own right of access to the road pursuant to ORS 227.215 which defines "granting or terminating a right of access" as development of land.

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The questions in *Thomas* and *Campbell* both involved substandard and nonconforming parcels and whether the county's zoning regulations, which determined when such substandard and nonconforming parcels must be combined for development purposes, were lawful (*Thomas*) or properly interpreted (*Campbell*). Both cases reiterate that under ORS 92.017 the City must recognize lawfully created lots as separate units and their property lines "inviolate." *Campbell* at 5*; Thomas* at 3. Defendants cite no case where properties, which were fully conforming with the locality's zoning code, were deemed not separately developable.

Defendants claim that the Director was not required to recognize the two separate Sumner Properties "as being separately developable." (Reply, p. 2.) But the City's Code does, and the City's Lot Confirmation did, recognize the two separate Sumner Properties as being separately developable. (FAC, ¶ ¶ 5, 35.) After Plaintiff sold the Sumner Properties, they were separately developed. (FAC, ¶ ¶ 9, 74.) Property rights run with the land. Defendants incorrectly argue that the powers given to the Director by the City's Code are so broad that they allow the Director to override the City's Code and a determination made by the Bureau of Development Services and deem the properties not separately developable. (Reply, p. 2.)

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"Reasonable" Cannot be Less Than What the City Council has Determined is "Necessary"

Defendants present, for the first time, argument as to how "reasonable access" ought to be defined in this case. Defendants assert that a residential property may be deprived of all vehicular access, yet still be deemed to have "reasonable access." (Reply, p. 2.) Defendants further claim that any vehicular access equates to "reasonable access." (Reply, p. 3.) Defendants erroneously cite *Kiasantana LLC v. County Metropolitan District of Oregon*, 20121 WL 2903228, *4 (D. Or), as authority for the foregoing theories. *Kiasantana* held that a property, which had previously enjoyed vehicular access across the whole of its frontage, still had reasonable access after a portion was blocked by a new pedestrian and cyclist's bridge. The property was left with access that exceeded that required by the City's Code.

Oregon's case law on the right of access spans more than 100 years. It has consistently held that the right of access attaches to property abutting a road; the case law does not limit that right to commercial properties or define it as pedestrian access. Under Oregon law, the right of vehicular access from private property (without qualification as to type of property) to an abutting public road is an interest in real property. *State of Oregon v. Alderwoods*, 358 OR 501 (2015), and cases there cited. See also, *Tri-County Metropolitan Transportation District of Oregon v. Walnut Hill, LLC*, 292 Or. App. 417,

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417-421 (2018) [Dispute over just compensation for taking of property interest in access to parking on residential property].

What is "reasonable access" ought to be that which is consistent with the law. For housing within the urban growth boundary, Oregon's statutory scheme requires that only clear and objective standards on the face of the City's ordinances may be applied to regulate the right of access and that when those standards are met, the access cannot be denied.

Two recent LUBA decisions revisited the 40-year history of the needed housing statutes and their clear applicability to vehicular access; *Legacy Development Group v. City of The Dalles*, LUBA No. 2020-099 (February 24, 2021), and *Nieto v. City of Talent*, LUBA No. 2020-100 (March 10, 2021).

Legacy and *Nieto* are consistent with earlier decisions which were unequivocal that when housing is being developed, access standards (including those for driveways) are subject to ORS 197.307(4). See, *HBA v. City of Eugene,* 41 Or. LUBA 370 (2002), LUBA No. 2001-059 and LUBA No. 001-063 (February 28, 2002), at 28; *Athletic Club of Bend v. City of Bend,* 243 P.3d 824, 239 Or. App. 89, 98-99 (2010); *Group B, LLC v. City of Corvallis*, LUBA No. 2015-019 (August 25, 2015), at 15-17; *Walter v. City of Eugene*, LUBA No. 2016-024 (June 30, 2016), at 5-12.

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In *Nieto*, the Board stated at page 9:

> "In *Rogue Valley Assoc. of Realtors v. City of Ashland*, we explained that approval standards are not clear and objective if they impose 'subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community.' 35 Or LUBA 139, 158 (1998), *aff'd* 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594 (1999)."

DRP 6.03 makes clear that Defendants Krueger and Wardrip saw the impacts of dense housing development on the right-of-way and created a policy designed to "balance or mitigate impacts of the development on . . . the adjoining properties or community." "Reasonable access" is what Oregon law and the City's Code says it is – not what Defendants Krueger and Wardrip and the other Defendants think it ought to be.

Title 33 of the City's Code allowed – as a matter of right – for the on-site driveways requested by Valhalla.[1] Valhalla met the apparent clear and objective standards in PCC 17.28.110 for the approach driveways. Pursuant to ORS 197.307(4), ORS 227.173(2), and ORS 227.175(4)(b)(A), Valhalla had a legitimate claim of entitlement to the driveways it requested and a constitutionally protected property interest in them. (Plaintiff's Response, p. 4, 25.) Under Oregon statutory law, the City was not entitled to deny the permits Valhalla sought.

[1] Title 33 has been amended after the events relevant to this complaint. All references to title 33 herein are to it as it existed during the relevant period.

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Pursuant to Title 33, "the minimum driveway width on private property is 9 feet." PCC 33.266.120.D.2. Pursuant to PCC 17.28.110.C.1, the minimum driveway approach width allowed for any residential property is 9 feet. That is exactly what Valhalla requested. The "driveway design of its choice" (Reply, p. 9.) was exactly the design the City's Code designated as the minimum access allowed. No standards for shared driveways exist in Title 17.

Given that restrictions on the use and enjoyment of private property are limited to those that a legislative body has determined are "necessary" for the public health, safety, morals, or general welfare,[2] it follows that the Portland City Council determined that it was necessary that on-site residential driveways be at least 9 feet wide and that approach driveways be at least 9 feet wide. Plaintiff respectfully submits that "reasonable access" requires at least a 9-foot-wide approach driveway connecting to a 9-foot-wide, on-site driveway, as that is what the City Council has determined is the minimum necessary for the public health, safety, or general welfare.

Under *Roberge*, "reasonable access" is defined by the limitations on access that a legislative body has determined to be necessary. Defendants cannot limit a property to access that does not meet standards the City Council has found "necessary" and call it "reasonable access." Absent a grant of reciprocal access

[2] *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

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easements to allow shared use of a driveway, the Director's Policy limited each Sumner Property to a 7-foot-wide approach driveway connecting to a 7-foot-wide, on-site driveway which, over a span of 6 feet[3], tapered out to a 10-foot-wide driveway. See, DRP 6.03, Figure 1.

Defendants, for the first time, assert that a true shared driveway is not what the Director's Policy requires. (Reply, p. 3, 15.) Rather, what DRP 6.03, Figure 1 requires is a single 14-foot-wide curb cut with two individual 7-foot-wide abutting driveways that do not involve crossing property lines or sharing the access easement which is appurtenant to each property.[4] At the front property line, each property has a 7-foot-wide access point within which they must stay. PCC 17.28.110.C.3 provides that, "Driveways shall be measured lengthwise with the sidewalk on the property line side." Therefore, the width of the access driveway is 7 feet, and the width of the on-site driveway is initially 7 feet.

Additionally, PCC 17.28.110.C.1 requires at least 5 feet of separation between driveways; representing a determination by the City Council

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[3] As DRP 6.03, Figure 1 illustrates, 6 feet assumes that the garage entrances are only 2 feet apart. Leaving 4.5 inches of interior "exit" space in each garage on that abutting wall (after accounting for 15 inches of firewall between the units). In reality, using the taper rate required, the additional 6 feet of setback is a fictional minimum.

[4] Driveway is defined as, "a paved way for vehicular traffic extending from the roadway to the property line across a sidewalk, whether or not such sidewalk is improved, for the purpose of providing access to parking or maneuvering space on abutting property." PCC 17.28.100.A.

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that it is necessary for the public health, safety, or general welfare to prohibit abutting driveways.

PCC 33.266.120.D's requirement for a minimum driveway width of 9 feet is not met by the DRP 6.03, Figure 1 design for the first 5 feet of each on-site driveway. Nevertheless, Defendants claim no reciprocal access easements are required. (Reply, p. 15.) The City's Code allows the minimum 9-foot driveway width to extend across a property line onto abutting private property if there "is a recorded easement guaranteeing reciprocal access and maintenance for all affected properties." PCC 33.266.120.D.3.b. Defendants do not explain how they meet the requirement for 9 feet without extending across a property line or how the Director can override land use regulations in Title 33.

One of two options must be true: (1) a true shared driveway is required with reciprocal access easements and a maintenance agreement; or (2) the access driveways do not meet the 9-foot width requirement for their entire length and the on-site driveways do not meet the 9-foot width requirement for their first 5 feet. Neither provides reasonable access as (1) requires giving an easement to another property as a condition of access, and (2) requires maneuvering through a space the City Council has determined is too narrow to be safe and violates the prohibition on abutting driveways. (The "no easement"

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design requires backing up at an angle to fit through an opening a foot narrower than a standard 8-foot garage door opening.)

The case Defendants newly cite, *Kiasantana*, did not involve the development of housing. The development of housing is subject to state statutes, which limit the standards that can be applied to regulate the development of housing to those that are clear and objective on the face of the City's ordinances and require issuance of permits when the application meets those standards. ORS 197.307(4), ORS 227.173(2), and ORS 227.175(4)(b)(A). That is a "stick in the bundle of property rights" created by Oregon law.

The restrictions on access applied to the Sumner Properties when Valhalla owned them were more onerous than those in the City's ordinances and resulted in inadequate access as defined by PCC 17.28.110.C.1.

Plaintiff respectfully submits that each of the Sumner Properties had a protected property right of reasonable access to the abutting road that has been defined by the City Council as a minimum of a 9-foot-wide access driveway connected at the property line to a 9-foot-wide on-site driveway. "Reasonable access" cannot be less than what the City Council has determined is necessary for safe access.

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ORS 197.015(10)(b)(D) Does Not Apply to the Denial of the Requested Driveways

Defendants assert for the first time that, pursuant to ORS 197.015(10)(b)(D), the decision Defendant Owings rendered was neither a land use decision nor a limited land use decision and, therefore, the statutory procedural requirements for quasi-judicial land use or limited land use decisions were not required. (Reply, p. 10.)

The issuance of building permits for the housing development Valhalla proposed for 730 and 740 NE Sumner Street was conditioned on receipt of the driveway permits necessary to access the on-site parking. The driveway permits were integral to the housing development. "On-site development necessarily requires the development of the right-of-way between the road and lot line." *Athletic Club of Bend v. City of Bend,* 243 P.3d 824, 239 Or. App. 89 98-99 (2010).

The denial of the driveway permits, which identified standards for a completely different building design, on-site driveway, and setbacks that the Director would require for an attached housing development on the Sumner Properties, and which was the City's final decision, a fortiori denied the building permits for the proposed housing.

Defendants acknowledge that Defendant Owings rendered a quasi-judicial decision when she denied the requested driveway permits. (Mot.

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Dismiss, p. 26.) Defendants acknowledge that Valhalla did not request waiver of any standards in the City's Code, but instead requested that the review and issuance of driveway permits comply with the requirements of ORS 197.307(4). (Mot. Dismiss, p. 26.)

Defendant Owings' quasi-judicial decision concerned the application of a land use regulation (both those she applied and those she should have applied) and implemented the interpretation and exercise of policy and legal judgment embodied in DRP 6.03. Title 17 and the City's policy, practice, and custom provided the Director with authority to deny any request for any driveway for the Sumner Properties. Pursuant to ORS 227.160(2), "'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation." Because this was a "statutory permit" decision, the City was required to comply with the procedures in ORS 197.763. They did not.

The absurdity of meeting the threshold for discretionary decisions that require a hearing in relation to a driveway permit for an "as of right" building permit illustrates how outside the bounds of expected practice the City's policies, practices, and customs are. The Director, who under state law is supposed to non-discretionarily apply clear and objective standards, through a clear and

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objective procedure to approve or deny driveway permits, instead is possessed of so much power and discretion that driveway permits become statutory permits.

It is absurd that a request for a driveway permit is how setback standards are altered, easements between private parties are demanded, building designs are imposed, determinations are made as to housing types which will receive more favorable access, and building permits are denied for development which meets the City's Code. Only because the Director has authority to deny driveway permits on a subjective basis, does he possess the power to demand exactions as a condition of approval. This kind of power and discretion triggers the State's requirements governing quasi-judicial land use decisions.

Defendants claim the ORS 197.015(10)(b)(D) exception applies to Defendant Owings' decision. However, that exception does not apply when an access decision is rendered as part of an application for the development of housing.

In *Warrick v. Josephine County*, LUBA No. 98-165 (March 25, 1999), the county moved to dismiss a LUBA appeal claiming the ORS 197.015(10)(b)(D) exemption from land use decisions applied because, as the county characterized it, the challenged decision dealt solely with transportation issues. The Board stated:

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> "Petitioners respond, and we agree, that the county's motion mischaracterizes the challenged decision. The challenged decision is plainly a decision approving a subdivision pursuant to the county's comprehensive plan and land use regulations and is thus a land use decision under ORS 197.015(10)(a). That the county's decision conditions its approval on construction of road access for the subdivision does not convert that decision or any part of the decision into a decision of the type described in ORS 197.015(10)(b)(D)." *Id.* at 4-5.

A decision on a building permit is excepted from the definition of a land use decision when the decision "approves or denies a building permit issued under clear and objective land use standards." ORS 197.015(10)(b)(B). In this case, the denial was based on the subjective and discretionary policy in DRP 6.03 and was not denied under clear and objective standards. The decision was a land use decision.

That transportation decisions rendered, with respect to the development of housing are land use decisions, is further illustrated by *Walter v. City of Eugene*, LUBA No. 2016-024 (June 30, 2016). In *Walter*, the local code contained ambiguous standards regarding the design of roads. On this basis, LUBA found that the provisions violated ORS 197.307(4).

> "Whatever its purpose, the 19-Lot Rule and the city's interpretation of it appear designed to "balance or mitigate" the impacts of a proposed PUD on the public street system and other developed properties in the vicinity of the proposed PUD, a subjective exercise that is contrary to the needed housing statute. *Rogue Valley*, 35 Or LUBA at 158." *Walter,* at 12.

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Defendant Owings rendered a discretionary land use decision. The scope of authority given to, and exercised by, the Director defines the driveway permit as a statutory permit. Defendants were required to, but did not, follow the statutory procedural requirements for a quasi-judicial land use decision. ORS 197.015(10)(b)(D) does not excuse Defendants from compliance with ORS 197.763.

Due Process and *Zinermon v. Burch*

Defendants assert that, "[r]emedies available in state court proceedings can satisfy the 14th Amendment's Due Process Clause." (Reply, p. 3.) Defendants newly cite *Zinermon v. Burch*, 494 U.S. 113, 125-126 (1990), as authority for their argument that the availability of post deprivation due process was adequate in this case. However, *Zinermon* very clearly states otherwise. After discussing the factors in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for determining what procedural protections the Constitution requires, the Court stated, "Applying this test, the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Id*. at 127. (Emphasis in original.) The Court then lists numerous cases for the proposition that a hearing is usually required before the state deprives a person of liberty or property.

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The Court then lists cases describing the types of circumstances in which post deprivation remedies can satisfy due process. Those are cases where predeprivation procedural safeguards would not address the risk; or there is a necessity of quick action; or it would be impractical to provide predeprivation process; or the deprivation was the result of a random and unauthorized act by a state employee. *Zinermon* at 128.

> "The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as the result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure, and the State cannot predict precisely when the loss will occur." *Id*. at 129.

Plaintiff's loss was the result of an established procedure, a written policy, and the City's policy, practice, and custom.

The Court goes on to state that it is in the "unusual case" in which "the value of predeprivation safeguards is negligible" in preventing deprivation that "the State cannot be required constitutionally to do the impossible by providing predeprivation process." *Zinermon* at 129.

> "In situations where the state feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a Postdeprivation tort remedy to compensate for the taking." *Id*. at 132.

Notably, Defendants do not cite, and Plaintiff is not aware of, any authority for the proposition that a city is allowed to effect deprivations of

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property without due process of law if the state government provides a post deprivation remedy.

Tort Claim Notice and *Coleman v. Oregon Parks and Recreation*

Defendants newly cite *Coleman v. Oregon Parks and Recreation Dep't*, 227 P.3d 815, 234 Or. App. 132 (2010), as a case in which Defendants claim the notice given was "akin" to the tort claim notice Plaintiff provided to Defendants on October 25, 2019. The Plaintiff in *Coleman* was the wife of an injured man. Without giving any formal tort claim notice, she filed a suit for loss of consortium. The conclusion was that she did not give any communication that would qualify as actual notice that would cause a reasonable person to conclude that she intended to assert a claim.

Defendants assert that even though the actual document in which the act of fraud occurred (the June 8, 2018 letter) was specifically cited in Plaintiff's tort claim notice with reference as to why Plaintiff deemed the document to be one of the circumstances giving rise to the claim – that the City had previously agreed that ORS 197.307(4) applied to driveways and had subsequently acted in a manner wholly inconsistent with a proceeding under ORS 197.307(4) – the City needed to also be referred to the Rodney Settlement Agreement to understand the time, place, and circumstances giving rise to the claim.

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But declaring the Rodney Settlement Agreement void is merely the prayed for remedy. The contents of the Rodney Settlement Agreement are not the basis of the fraud claim. The notice made clear that Valhalla intended to assert a claim that Valhalla had been damaged when the City handled the Sumner Properties application differently than the June 8, 2018, letter represented the City would handle such an application. It was clear that Valhalla considered false representations to have been made in the June 8, 2018, letter and it was clear that Valhalla was surprised by the Sumner Properties decision. A notice which includes the message, "You lied to me, and I intend to assert claims against you" ought to be enough to alert the City that one of the claims coming may be fraud.

Defendants ignore the allegations in Plaintiff's FAC and falsely claim that the basis for the fraud claim is merely a "misreading" of letters. Plaintiff had already suffered the consequences of the City acting in accord with the May 24, 2019, letter before it received the letter. It was the receipt of the May 24, 2019, letter that alerted Valhalla to the fact that the bad acts were officially sanctioned by the City.

Defendants falsely claim that "Plaintiff concedes its Fraud in the Inducement claim is not meant to be a stand-alone claim." Plaintiff made no such "concession." Defendants appear to claim that since Plaintiff did not pray for

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money damages on its fraud claim, it is not a real claim. Nevertheless, such accusations are not relevant to whether Plaintiff's tort claim notice was adequate.

Setback Requirement

Defendants assert, for the first time, that "the City's rules regarding set-back distances" are defined as those imposed by DRP 6.03. (Reply, pp. 14-15.) However, on page 8 of their Reply, Defendants assert that DRP 6.03 is not a rule. "DRP 6.03 is an administrative regulation, directed at PBOT employees, with the sole purpose of furthering the Director and City Traffic Engineer's public safety judgments, … ." (Reply, p. 8.)

Defendants concede that the DRP 6.03 design "increases the set-back requirement." (Reply, p. 14.) Defendants then opine, without reference to any authority, that development of property features that are an allowed voluntary choice – as opposed to a development requirement imposed by the City – is all that is required for Defendants to require a variance to the setback standards in the City's Code. (Reply, p. 15.)

Under this theory, the setback rules do not apply to two-story houses because the City allows, but does not require, two stories. They do not apply to houses with basements, houses with covered back patios, houses with fences, houses painted blue, etc. because, while all those things are allowed by the City's Code, none of those things are required by the City's Code.

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Defendants' statement that Valhalla was "required to comply with the City's rules regarding set-back distances" is extremely misleading in that in this instance, Defendants' reference to "the City's rules" means DRP 6.03 and not the City's Code.

Equal Protection

Defendants falsely state that, "Plaintiff concedes the City's distinction between attached and detached housing with respect to access to the right-of-way is rationally related to serving legitimate government interests. (See Plaintiff's Response, p.44.)" (Reply, p. 15.) Plaintiff's statement that "the City Council could adopt legislation . . ." was not an endorsement of the rationality of such legislation, it was a statement of who had authority to adopt such legislation. It was part of a section regarding Defendants exceeding their authority in making such a rule without City Council action.

Plaintiff reiterates its position as stated in its FAC, "Whether two units of housing are attached or detached has no rational relationship to how a driveway impacts the public right-of-way." (FAC, ¶ 144.) The difference between attached and detached housing is irrelevant unless two units of attached housing threaten the public right-of-way in a way that two units of detached housing on the same lots would not. Plaintiff submits there is no rational basis

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for believing as much. See, *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 448 (1985).

Mayor Wheeler and Former Commissioner Eudaly

Defendants falsely state that, "Plaintiff concedes that neither one of these defendants could have had the invidious, discriminatory intent necessary for Plaintiff's Equal Protection Claim. (Plaintiff's Response, p. 56)." (Reply, p. 18.) Defendants Wheeler and Eudaly need not have racial or other invidious, discriminatory intent when they had an impermissible motive – supporting the enforcement of the unlawful limitations on property rights called for in DRP 6.03 – which the City enforced through the pretext of claiming the City's Code required two separate, fully conforming, separately developable, properties in single ownership to be defined as having a total of one frontage between them. See, *Lazy Y Ranch Ltd. v. Behrens,* 546 F. 3d 580, 591 (9th Cir., 2008).

Pursuant to PCC 17.04.010.M, "'Frontage' means the length of public right-of-way adjacent to a property, measured in feet." Under the City's codified definition, every property has its own frontage. Pursuant to ORS 92.017 and the City's lot confirmation, 730 and 740 NE Sumner Street were two separate properties.

Inexplicably, Defendants simultaneously claim that (1) clear and objective standards require treating two properties as sharing one frontage, and

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(2) applicants in the foregoing situation are necessarily pursuing an "alternative discretionary process." See, May 24, 2019, letter from City attached hereto as **Exhibit A**. In other words, the City claims to have clear and objective standards, which preclude attached housing development from being regulated by clear and objective standards.

In the May 24, 2019, letter, the City Attorney's Office relayed the City Council's decision to – without adopting a resolution, ordinance, or any legislation – impose the restrictions on property contained in DRP 6.03 on the pretext that the City's Code contained standards which mandated the DRP 6.03 restrictions, when, in fact, the City's Code contained standards which precluded the requirements in DRP 6.03. The City Attorney's Office is the entity which responded to Valhalla's March 25, 2019, letter to the City Council and, as such, was the spokesman for the City and the City Council. See, *Giglio v. United States*, 405 U.S. 150, 154 (1972). Having been made aware that the City Attorney's Office had determined that DRP 6.03 could not be the source of standards in a proceeding under ORS 197.307(4), Mayor Wheeler, and former Commissioner Eudaly participated in, and supported, the pretext of claiming that the City's Code exempted attached housing development from compliance with ORS 197.307(4).

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These actions were without cause based upon the law. They were arbitrary. Black's Law Dictionary, (Sixth Edition 1991). "It is well established that a city may not enforce its zoning and land use regulations arbitrarily. See, e.g., *Cleburne*, 473 U.S. at 447, 105 S.Ct. at 3258; *Lockary*, 917 F.2d at 1155." *Armendariz v. Penman*, 75 F.3d 1311, 1327 (9th Cir., 1996) (en banc), *overruled in part on other grounds.* As illustrated by *Athletic Club of Bend v. City of Bend*; *Warrick v. Josephine County*; and *Walter v. City of Eugene*, supra, ORS 197.307(4) applies to decisions made about vehicular access to housing. The case law is unequivocal and voluminous on this point.

> "To establish an Equal Protection claim, the asserted rational basis for selectively enforcing the law must also be a pretext for an impermissible motive … . Conversely, there is no rational basis for state action that is ... plainly arbitrary." (Internal citations omitted.) *David Hill Development v. City of Forest Grove*, 3:08-cv-266-AC, at 41-42 (D. OR, October 30, 2012).

The City's asserted rationale for denying the individual Sumner Properties individual access (that the City's Code required as much) was untrue and a mere pretext for applying DRP 6.03.

Defendants Wheeler and Eudaly knew that the City's Code did not require the driveway configurations required by DRP 6.03. They supported the use of pretext rather than the adoption of legislation to impose the limitations contained in DRP 6.03.

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CONCLUSION

Based on the foregoing, Plaintiff respectfully requests the Court to grant its Motion for Leave to File a Surreply in response to new arguments and false factual claims made by Defendants in Defendants' Reply to Plaintiff's Response to Defendants' Rule 12 Motions to Dismiss of August 16, 2021.

DATED this 17th day of September 2021.

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May 24, 2019

SENT VIA EMAIL AND CERTIFIED MAIL #7014 2870 0001 3383 8973
mari@valhallacustomehomes.com

Ms. Mari Ives
Lead Design/General Counsel
Valhalla Custom Homes, LLC
14210 SE Harney Street
Portland, OR 97236

Re: Notice of Intent to Request Enforcement Order

Dear Ms. Ives:

This is in response to Valhalla Custom Homes' ("Valhalla") letter dated March 25, 2019. In that letter, Valhalla requested a number of actions by the City Council that all relate to PCC 17.28.110 and are overlapping. First, you ask Council to adopt a resolution instructing the Portland Bureau of Transportation ("PBOT") to prepare proposed revisions to Title 17 and PCC 17.28.110 to provide clear and objective standards for needed housing. Second, you request that PBOT propose and City Council adopt revisions and amendments to Title 17 and PCC 17.28.110, when applicable, that provide only facially clear and objective standards. Third, you ask PBOT propose and City Council adopt revisions and amendments to Title 17 and PCC 17.28.110 that provide clear and objective standards for a driveway access permit. Fourth, you request PBOT propose and City Council adopt revisions and amendments to Title 17 and PCC 17.28.110 to provide clear and objective standards for driveway access, that do not conflict with the on-site driveway standards in Title 33.

You also request that the City Council pass a resolution directing PBOT to publish a statement to employees and the public, that until the revisions to PCC 17.28.110 are adopted in accordance with your specific requests for driveway access, the standards must be facially clear and objective. Finally, you request that the City Council direct PBOT to publish a list of the current standards it identifies as clear and objective standards for driveway access. Alternatively, Valhalla requested the Land Conservation and Development Commission ("LCDC") to issue an enforcement order against the City to give Valhalla the same relief.

Regulations of City's Right-of-Way are Not the "Development of Needed Housing"

Title 17 of the Portland City Code governs public improvements. There are more than 50 chapters in Title 17 that govern a range of topics all related to the management and operation of public infrastructure, including but not limited to system development charges, sidewalk cafes and

vendors, public sewer connections, advertising on bus benches, and the naming of streets. Title 17 applies to all zones and is not limited to residentially zoned land.

The City Council has authorized PBOT to permit and manage access to the public right-of-way. PCC 17.24.005. PBOT is also authorized to issue permits to construct a driveway in the right-of-way. PCC 17.28.110. "Driveway" is defined to mean "a paved way for vehicular traffic extending from the roadway to the property line across a sidewalk, whether or not such sidewalk is improved, for the purpose of providing access to parking or maneuvering space on abutting property." PCC 17.28.100. That is, a "driveway permit" is an authorization to construct a curb cut and a driveway apron in the City's right-of-way.

ORS 197.307 describes the need for "affordable, decent, safe and sanitary housing opportunities" as a matter of statewide concern. As such, a local government must provide clear and objective standards, conditions and procedures "regulating the development of housing." ORS 197.307(4).

The manner in which PBOT permits and manages the public right-of-way is *not* "regulating the development of housing." The City disagrees with your argument that the City's home rule authority to regulate access to the right-of-way is preempted by ORS 197.307, which governs the development of housing.

Additionally, the City disagrees with your characterization of ORS 227.215. As an initial matter, the definition of the term "development" is exclusively limited to that section. ORS 227.215(1). If the legislature intended that term to be the same as it is used in ORS 197.307, it would have done so.

Moreover, ORS 227.215 provides that a city *may* plan and *may* adopt ordinances and the ordinances *may* provide for development permitted outright and discretionarily. The statute does nothing more than merely describe what the City is already authorized to do under its home rule authority. Under the Oregon Constitution, local governments have the authority to determine the local scope of power without requiring statutory authorization. While state law can preempt local civil law, it has not done so here. In order to preempt the local government, the statute must "unambiguously expresses an intention to preclude local governments from regulating" in the same area as governed by the statute. *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 450-51 (2015); *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010). Providing that the City may adopt an ordinance is a far cry from unambiguously expressing an intent to preempt.

Existing Regulations Provide Applicants Clear and Objective and Discretionary Paths

As previously discussed in response to your 2018 request for enforcement order, Title 17 provides applicants with clear and objective standards for obtaining a driveway or an alternative discretionary path. Under the clear and objective path, the Code requires that a property frontage

of 50 feet or less must have a driveway with a minimum width of nine feet and a maximum width of 20 feet. PCC 17.28.110(C)(1). A frontage under 100 feet under single ownership is considered one frontage, regardless of the number of dwelling units. *See* PCC 17.28.110(C).

As an alternative to that clear and objective standard, when a property frontage has one owner, more than one driveway within 100 feet of frontage *may* be allowed with the approval from the Director of PBOT and the City Traffic Engineer. PCC 17.28.110(C)(1).[1] Additionally, PBOT is authorized to permit variances to the width standards. PCC 17.28.110(C)(4). However, in granting a waiver of the standards, PBOT may establish conditions to ensure safe and orderly flow of pedestrian and vehicular traffic. PCC 17.28.110(C)(4). When considering alternatives to the standards in Title 17, PBOT may establish conditions regarding "safe and orderly flow of pedestrian and vehicular traffic." PCC 17.28.110(C)(5).

Although not required to, the City Traffic Engineer and Development Review Manager provided PBOT staff with written policies clarifying that in R 2.5 zones, attached units must have a shared driveway in these alternative path situations. *See* Development Review Policy (DRP) 6.03 (Exhibit C). The written policy provides staff with consistent and clear direction when discretionary review is involved rather than the clear and objective standard delineated in PCC 17.28.110(C). These policies are not yet adopted by ordinance, although nothing requires the City to adopt the policy by ordinance. PCC 17.28.110(1) is the basis of PBOT's authority to approve a discretionary, alternative to on the clear and objective standards.

DRP 6.03 requires a shared driveway for attached dwelling units in R 2.5 zones. "Attached dwelling units" is defined to include duplexes. The policy is based on PBOT's effort to preserve on-street parking and respond to the considerations including enhancing the pedestrian environment as outlined in PCC 17.28.110(C)(5). DPR 6.03. Therefore, even when an applicant pursues PBOT's alternative discretionary process, PBOT applies a clear and objective standard.

Pending Code Amendments to Provide Additional Clarity

While we continue to disagree that PBOT's requirements regarding driveway access to the right-of-way are not clear and objective, or that they are a regulation of the development of housing, including needed housing under ORS 197.307(4) and ORS 227.173(2), PBOT has drafted proposed revisions to PCC 17.28.110 ("Driveways – Permits and Conditions"), that codify criteria PBOT uses to determine driveway access. These revisions largely address many of the concerns raised in your letter. The proposed revisions to PCC 17.28.110 are tentatively proposed to go before Council in June and we are happy to provide those for your comments prior to filing with the Council Clerk. Additionally, PBOT is in the process of more comprehensive amendments to Chapter 17.28 and Title 17 generally, where applicable, that require vetting by internal and external

[1] "Owner" is defined to mean "the owner of the real property or the contract purchases of real property of record as shown on the last available assessment roll in the office of the county assessor." PCC 17.28.015.

stakeholders. We hope to have those available soon. I hope this addresses the concerns noted in your letter. If you have any further questions or concerns, please do not hesitate to contact me.

Respectfully,

Kenneth A. McGair
Senior Deputy City Attorney

KM/vs
Encl.

c. Kurt Krueger, Portland Bureau of Transportation (via email only)

CERTIFICATE OF COMPLIANCE

This motion complies with the applicable Court approved word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 5,001 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **PLAINTIFF'S SURREPLY IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS** on:

William Manlove, OSB #891607 Portland Office of the City Attorney 1221 SW 4th Avenue, Room 430 Portland, OR 97204 william.manlove@portlandoregon.gov *Of Attorneys for Defendants*	☐ U.S. Mail ☐ Facsimile ☐ Hand Delivery ☐ Overnight Courier ☒ Email ☒ Via CM/ECF E-Filing

DATED this 17th day of September 2021.

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CERTIFICATE OF COMPLIANCE

This motion complies with the applicable Court approved word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 909 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **PLAINTIFF'S MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS** on:

William Manlove, OSB #891607 Portland Office of the City Attorney 1221 SW 4th Avenue, Room 430 Portland, OR 97204 william.manlove@portlandoregon.gov *Of Attorneys for Defendants*	☐ U.S. Mail ☐ Facsimile ☐ Hand Delivery ☐ Overnight Courier ☒ Email ☒ Via CM/ECF E-Filing

DATED this 17th day of September 2021.

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